2002

The State of Utah, Plaintiff/Appellee v. Korry Barlow Smedley, Defendant/Appellant : Brief of Appellant

Utah Court of Appeals

J. Frederic Voros, Jr.; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Attorneys for Appellee.
Linda M. Jones; David V. Finlayson; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
KORRY BARLOW SMEDLEY,	:	Case No. 20020171-CA
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for four counts of aggravated sexual abuse of a child, first degree felony offenses in violation of Utah Code Ann. § 76-5-404.1(3) (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Paul G. Maughan, Judge, presiding.

LINDA M. JONES (5497)
DAVID V. FINLAYSON (6540)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

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Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

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Defendant/Appellant.	:	Priority No. 2

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002), where the case was transferred to this Court from the Utah Supreme Court. In the underlying case related to this appeal, Appellant Korry Smedley was convicted of four counts of aggravated sexual abuse of a child, first degree felony offenses under Utah Code Ann. § 76-5-404.1(3) (1999). A copy of the judgment is attached hereto as Addendum A.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows: Whether the trial court erred in allowing the state to present evidence of defendant's request for plea discussions.

Standard of Review: "The question of whether evidence is admissible can be either a question of discretion, which we review for abuse of discretion, or a question of law, which we review for correctness." State v. Martin, 2002 UT 34, ¶29, 44 P.3d 805. Once the prosecutor affirmatively presents testimony into evidence, the question of admissibility should be reviewed as a question of law. See id.

PRESERVATION OF ARGUMENT

The issue in this case is preserved in the record on appeal at 272:182-186; and 277:78-80, 170-172. See State v. Saunders, 1999 UT 59, ¶¶18-19, 992 P.2d 951.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following rules will be determinative of the issue on appeal: Utah Rules of Evidence 401, 402, 408 and 410 (2002). The text of those provisions is contained in the attached Addendum B.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, Disposition in the Court Below.

In May 2001, the state filed amended charges against Smedley for four counts of aggravated sexual abuse of a child, first degree felony offenses under Utah Code Ann. § 76-5-404.1 (1999). (R. 27-31.) The information alleged that Smedley sexually assaulted "K.B., DOB 08/02/91" and "S.B., DOB 01/08/93" on multiple occasions between September 1999 and August 2000. (Id.)

On September 26, 2001, the trial court commenced the first trial in the matter. (R. 272; 273.) At the conclusion of the trial, the judge declared a mistrial on the basis that the jury was not able to come to a unanimous decision. (R. 273:279-80.)

On November 27, 2001, the trial court commenced a second trial in the case. (R. 277-78.) That trial resulted in convictions for all counts as charged. (R. 277; 278; 238-39.) On February 7, 2002, the trial court entered judgment against Smedley, sentencing

him to an indeterminate prison term of five years to life for each offense, and to a combination of concurrent and consecutive sentences. (R. 240-242.) This appeal followed. (R. 247-48.)

STATEMENT OF FACTS

In January 2001, the state charged Smedley with four counts of aggravated sexual abuse of a child; the state amended the Information in May. Counts I and II alleged that between September 1999 and August 2000, Smedley "touched the anus, genitals, buttocks, or breasts" of K.B., whose date of birth was August 2, 1991. (R. 2-4; 27-31; see also 225; 226.) Counts III and IV alleged similar conduct with respect to S.B., whose date of birth was January 8, 1993. (R. 2-4; 27-31; see also 227; 228.)

The state's evidence at trial reflected the following. In September 1999, Debra Baldwin and her three daughters moved into Smedley's one-bedroom apartment with him. Baldwin's daughters were Kaylynn ("K.B."), Savanna ("S.B."), and Isabella. They were ages 8, 6, and 5, respectively. (R. 277:91-93.) Baldwin testified that Smedley was verbally abusive toward her. However, Smedley had a good relationship with the girls, and they cared for each other. The children cared for Smedley like a father. (R. 277:94-96.) According to Baldwin, Smedley was not verbally abusive toward the girls. (R. 277:95-96.)

During the time that Baldwin and Smedley lived together, Smedley worked as a painter while Baldwin stayed home with the girls. (R. 277:100, 108.)

Baldwin testified that on August 27, 2000, she and Smedley had an argument and he left the apartment. Baldwin decided that she "was tired of the abuse," and she also left with her children. (R. 277:97.) Baldwin took the girls to the bus stop, and after approximately 20-30 minutes she decided they would "go home." (R. 277:97.) When she told the girls of her plans to return, they "were frantic, they did not want to go back." (R. 277:98.) Baldwin asked why, and the girls told her that Smedley was "mean and they just didn't want to go back." (R. 277:98, 101.) Baldwin then asked the girls "if he was touching them on the private." K.B. and S.B. said yes. (R. 277:98, 102, 104.)

Baldwin returned to the apartment only to collect her belongings, then she went with the girls to her sister's house, where they stayed for a few days. (R. 277:103.) When the girls arrived there, they went out to play with their cousin on the trampoline. (R. 277:127.) Baldwin did not discuss the "touching" matter with the girls any further. She later talked to the police about the allegations. (R. 277:103.)

Next, S.B. testified at trial. She stated that when she was in the second grade, she lived with Smedley in his apartment with her sisters and mother. (R. 277:113-14.) S.B. testified that she did not like Smedley because he was "mean" and he touched her "in the wrong place." (R. 277:115.) The prosecutor elicited testimony from S.B. that when she talked about "the wrong places," S.B. was referring to her buttocks and vagina. (R. 277:116.) S.B. did not recall when Smedley touched her. (R. 277:116.)

S.B. testified that she saw Smedley touch K.B. "in the wrong place" while they

were in bed in the bedroom of the apartment. (R. 277:116.) S.B. did not know if she talked to Smedley about the matter. (R. 277:116-17.)

S.B. testified that after the incident with K.B., Smedley touched her in the wrong place "in the house" and in his big red truck when the two of them were going to the store. (R. 277:117.) She testified that Smedley made her rub his penis with lotion through his zipper, while his hand was outside her clothing on her vagina. Smedley made S.B. rub him until he ejaculated, and he wiped his penis with a tissue. (R. 277:117-23.) S.B. testified that the touching happened less than five times in the truck. (Id.)

According to S.B., Smedley also made her touch him and he touched her vagina between 5 and 7 times at home under her clothing in the bedroom while her mother was home. (R. 277:122-23.) S.B. stated Smedley used lotion that he kept in a bottle in the bedroom. (R. 277:124.) According to S.B., after Smedley ejaculated at home, he washed his penis in the bathroom while she washed lotion off her hands. (R. 277:124.)

S.B. testified that she discussed being touched in "the wrong place" with prosecutors at least three times and with a detective and a guardian ad litem. (R. 277:128-29.) S.B. could not remember when the first incident occurred (R. 277:129), or any incident thereafter. (R. 277:130.)

K.B. also testified at trial. She stated she was eight when her family moved into Smedley's apartment. (R. 277:145.) During that time, K.B. called Smedley "Dad" and she felt like he was her father. (R. 277:136.) According to K.B., she and her sisters slept

in the living room, while Smedley and Baldwin slept in the bedroom. (R. 277:135-36.)

K.B. testified that Smedley touched her in "the wrong place" "a lot" and Smedley made her touch him "a few times." (R. 277:137, 158.) According to K.B., the first time Smedley touched her, "we like came into his house one day and we had a big group hug and then he reached down my pants and touched me" while her mother and sisters were there. (R. 277:150 (K.B. responded "Uh-huh" when defense counsel asked if K.B.'s mother was there; compare that to R. at 277:139 where "Huh-uh" means "no"; and to 277:145, where K.B. answers "Uh-huh" when asked if her sister's name is Isabella).)

Also, according to K.B., Smedley rubbed her vagina with his fingers while they were in the living room with the other girls watching television, and Baldwin was sleeping. (R. 277:137-38.) While K.B. originally testified that Smedley touched her when they were in the living room, she later testified that he also touched her in the bedroom. (R. 277:138, 156.)

K.B. recalled one occasion when Smedley touched her. She stated that she and her sisters were watching "PB and J Otter" in the living room on a Saturday or Sunday, and she was sitting beside S.B. and Smedley. (R. 277:156-57.)

K.B. also testified that while she was in the truck with Smedley, he would offer to buy K.B. "treats and stuff" if K.B. would rub his penis with lotion. (R. 277:140-41.) K.B. testified that Smedley would ejaculate then wipe his penis with a napkin. (R. 277:141.) According to K.B., S.B. occasionally was sitting in the truck with them in the

backseat. (R. 277:142, 151-52.) When K.B. was asked to tell the jury about Smedley's conduct in the truck, she stated she did not remember. (R. 277:152.)

K.B. testified that she spoke with various people on five or six different occasions about being touched in "the wrong place." (R. 277:148.)

Detective Kathleen Rackley also testified for the state. She spoke with K.B. and S.B. after their mother reported the alleged abuse. (R. 277:165.) According to Rackley, the children's testimony was similar to what they told her during interviews in September 2000. (R. 277:167.) Rackley also testified that during her investigation, she learned that Smedley and the girls had a good relationship with each other, and the girls seemed unaffected by the alleged abuse. (R. 277:206.)

Rackley testified that she and a second officer spoke with Smedley. (R. 277:168.) She stated that Smedley waived his rights per Miranda and agreed to speak with the officers about the girls' allegations. (R. 277:169.) During the interrogation, Smedley denied any sexual or inappropriate contact with the girls. (R. 277:170.)

Over defense counsel's pretrial objections (R. 277:78-79), Rackley testified that Smedley "wanted to know what – you know, what kind of deal he could get if he pled guilty, you know, exactly what the penalty would be. If he were to plead guilty, what would he get." (R. 277:170-71.) Rackley testified that Smedley asked several times about a deal if he pled. "He kept asking what kind of a deal could he get, How long am I looking at?" (R. 277:171.) The officers informed Smedley that they "don't make deals

with people." (R. 277:171.) When the prosecutor asked the detective why Smedley "wanted to make a deal" if the allegations were untrue, the detective answered, "He did mention that, he didn't want the girls to have to testify, but he just needed to know what kind of penalties this would come with before he would, you know, talk to us any further." (R. 277:172.)

At the conclusion of trial, the jury convicted Smedley as charged. He is appealing from the final judgment. Additional facts related to this appeal are set forth below.

SUMMARY OF THE ARGUMENT

Over defense counsel's objections, the state presented evidence at trial that during a police interrogation, Smedley inquired into a plea "deal." Smedley was interested in entering into a deal in order to protect the girls from having to testify at a criminal trial. The trial court erred in admitting the testimony into evidence. The testimony violated Rules 401, 402, 408 and 410, Utah Rules of Evidence.

Specifically, evidence of "compromise negotiations" and plea discussions is inadmissible under Rules 408 and 410 because such evidence is irrelevant and does not constitute an admission of guilt. Likewise, such evidence is inadmissible for public policy reasons. Where plea discussions are encouraged between parties, the admission of such evidence at trial would undermine the benefits achieved through use of the negotiation process.

Also, the evidence in this case was inadmissible under the relevancy rules. It did

not have any bearing on any element of the crimes charged, and it did not make the fact that Smedley otherwise denied the alleged abuse more or less probable, particularly since he sought a plea deal for the benefit of the children: he did not want them to have to go through the trauma of testifying at trial. Smedley's reasons for seeking a plea deal were legitimate and should not have been used in a way to suggest guilt. As further set forth below, the inadmissible evidence prejudiced Smedley and denied him a fair trial in the matter. Smedley respectfully requests that this Court reverse the convictions in this case and remand the matter for a new trial, excluding the inadmissible evidence.

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS INTO EVIDENCE CONCERNING SMEDLEY'S PLEA DISCUSSIONS.

A. THE STATEMENTS WERE INADMISSIBLE UNDER THE UTAH RULES OF EVIDENCE.

(1) *Utah Rules of Evidence 408 and 410.*

Rule 410 of the Utah Rules of Evidence states the following:

> Except as otherwise provided in this rule, *evidence of the following is not*, in any civil or criminal proceeding, *admissible against the defendant who* made the plea or *was a participant in the plea discussions*:
>
> * * *
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Utah R. Evid. 410 (2002) (emphasis added). Rule 408 likewise provides that statements made in "compromise negotiations" are inadmissible. Utah R. Evid. 408 (2002).

Rules 408 and 410 apply in both civil and criminal cases. See Utah R. Evid. 101 (2002) (the rules of evidence govern proceedings in the courts of this State); id. at 102 (rules shall be construed to secure fairness and "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"); State v. Pearson, 818 P.2d 581, 583 and n. 4 (Utah Ct. App. 1991) (applying *Rule 410*, and also citing U.S. v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976), for the proposition that "under the rationale of *Fed. R. Evid. 408*, which relates to the general inadmissibility of compromises and offers to compromise, government proposals concerning pleas should be excludable" (emphasis added)).

According to the plain language of Rule 410, it excludes evidence of "plea" discussions. See State v. Redd, 1999 UT 108, ¶11, 992 P.2d 986 (court construes provision according its plain language). Plea discussions include "even an attempt to open plea bargaining." See Fed. R. Crim P. 11, Advisory Committee Notes, Note to Subdivision (e)(6); U.S. v. Brooks, 536 F.2d 1137, 1139 (6th Cir. 1976). That is, statements made in an effort to initiate a plea deal fall within the definition of "plea" discussions under the rules. See Brooks, 536 F.2d at 1139.

While "plea discussions" logically occur only in criminal cases, Rule 410 specifically excludes evidence of "plea discussions" in both criminal and civil cases. Subsection (4) provides that such statements are inadmissible in evidence "in any civil or criminal proceeding" if they were made "in the course of plea discussions with an

attorney for the prosecuting authority." Utah R. Evid. 410(4) (2002).

In determining whether a defendant's statements to government agents regarding a "plea" deal are excludable under Rule 410(4), federal courts have applied a two-tiered test. The test considers, first, whether the defendant "exhibited an actual subjective expectation to negotiate a plea at the time of the discussion," and second, whether the defendant's "expectation was reasonable given the totality of the objective circumstances." U.S. v. Conaway, 11 F.3d 40, 42 (5th Cir. 1993) (applying two-tiered test to evaluate whether statements must be excluded under Rule 410); U.S. v. Guerrero, 847 F.2d 1363, 1367 (9th Cir. 1988) ("A statement was made in the course of plea discussions if: (1) the suspect exhibited an actual subjective expectation that he was negotiating a plea at the time of the discussion; and (2) the suspect's expectation was reasonable given the totality of the circumstances").

Although the language of Rule 410(4) excludes statements from evidence made in the course of discussions "with an attorney for the prosecuting authority," federal courts have not required proof that the discussions were with an attorney for the prosecution or an agent with actual authority before applying the rule to exclude the evidence. U.S. v. Swidan, 689 F.Supp. 726, 728 (E.D. Mich. 1988) (rejecting the argument that only discussions with the prosecuting attorney or his authorized agents are excluded under the rule).

In fact, federal courts have ruled that if Rule 410 were to apply only when the

government agent had *actual authority* to negotiate a plea, that would create an unfair trap for the unwary defendant since he generally interacts with officers, who are engaged in calculated interrogation. See U.S. v. Bridges, 46 F.Supp.2d 462, 465-66 and n. 12-13 (E.D. Va. 1999), aff'd, 217 F.3d 841 (4th Cir. 2000). If the defendant were required to prove "actual authority," a law enforcement agent "need only propose to relay any offers to the prosecuting attorney, and thus preserve the government's freedom to choose to enter into plea discussions or to use the statements against the accused. This does not protect the plea discussion process." Swidan, 689 F.Supp. at 728. Also, such tactics would be unfair to the defendant.

The plain language of Rule 408 also supports that it applies in criminal cases. Rule 408 excludes the admissibility of evidence of "conduct or statements made in compromise negotiations." Utah R. Evid. 408 (2002). Since "compromise negotiations" occur in both civil and criminal cases, the rule applies with equal force in both situations.

Indeed, Rule 408 specifically excludes evidence of negotiations in cases except when the evidence is offered to show bias or prejudice, to rebut a claim of "undue delay," or to prove *obstruction* in a "criminal investigation or prosecution." Utah R. Evid. 408. Since the rule *does not* apply in certain circumstances identified in the rule (*e.g.* to prove obstruction in a criminal case), it must be construed otherwise to apply in criminal cases to exclude plea statements relating to the charge at bar. Stated another way, this Court will not interpret Rule 408 in a manner that renders the exceptions inoperative; it will not

interpret the provision to apply only in civil cases, since that would render the specifically articulated *exception* (*e.g.* to prove obstruction in a criminal case) to the rule to be superfluous. See Hall v. Utah State Dept. of Corr., 2001 UT 34,¶ 15, 24 P.3d 958 (stating court will "avoid interpretations that will render portions of a statute superfluous or inoperative").

Also, Rule 408 has been interpreted to apply only to plea discussions and negotiations occurring in the case at bar. See Pearson, 818 P.2d at 582-84 & n.4 (applying Rule 410 to plea discussions that occurred in the criminal case at bar, and recognizing application of Rule 408); see also Broadcort Capital Corp. v. Summa Medical Corp., 972 F.2d 1183, 1191 (10th Cir. 1992) ("Rule 408 only bars admission of evidence relating to settlement discussions if that evidence is offered to prove 'liability for or invalidity of the claim or its amount.' Here, the evidence related to an entirely different claim – the evidence was not admitted to prove the validity or amount of the 'claim under negotiation'") (cite omitted).[1]

Finally, Rules 408 and 410 are supported by public policy concerns. See Shriver v. State, 632 P.2d 420, 426 (Okla. Crim. App. 1980) (recognizing that even without a statute

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1 Generally, evidence of settlement negotiations that took place in a different case or claim will be admissible at trial in the case at bar. See 2 Jack Weinstein & Margaret Berger, Weinstein's Evdience, ¶ 408 at 408-32 to 408-33 (1991) (where the settlement negotiations and terms are part of another dispute, they must be admitted in evidence); see also State v. Mead, 2001 UT 58, ¶¶44-46, 27 P.3d 1115 (finding that Rule 408 does not serve to bar statements in a criminal trial that were made during civil negotiations between private parties).

making plea negotiation statements inadmissible, such statements should be protected from disclosure at trial). In considering application of Rule 410, this Court in State v. Pearson, 818 P.2d 581, stated that public policy precludes the admission into evidence of "plea discussions in which the defendant participated." Id. at 583. Plea bargaining is essential to the criminal justice system and should be encouraged. Fairness dictates that plea discussions between defendant and the prosecution should be excluded from evidence. See id. at 582-83; see also State v. Shabata, 678 P.2d 785, 788 (Utah 1984) (recognizing that police officers are part of the government's prosecution team); Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964).

Thus, public policy makes evidence of negotiations and plea discussions inadmissible under Rules 408 and 410 for the following reasons: First, the evidence is irrelevant. See Pearson, 818 P.2d at 584 n.6 (seriously questioning the relevancy of such evidence); Fed. R. Evid. 408, Advisory Committee Note (such evidence "is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position"); see State v. Gray, 717 P.2d 1313, 1317 (Utah 1986) (where Utah rules were modeled after federal rules, Utah courts will look to federal law to aid in interpreting the Utah provisions).

Second, such discussions do not constitute an admission of liability. See Fed. R. Evid. 408, Advisory Committee Note ("As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case

may be, the validity or invalidity of the claim"); see also Gray, 717 P.2d at 1317 (in construing rules of evidence Utah courts will look to federal law).

Pursuant to Rules 408 and 410(4), the state's evidence at trial that Smedley requested plea negotiations was inadmissible. The evidence should have been excluded from trial, as further explained below. See infra, subpart A.(3), herein.

(2) *The Relevancy Rules 401 and 402.*

Rules 401 and 402, Utah Rules of Evidence, provide that "relevant evidence" is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401 (2002). "Evidence which is not relevant is not admissible." Utah R. Evid. 402 (2002); see also id. at 403 (although relevant, evidence may be excluded if it is unduly prejudicial or will mislead the jury). In Pearson, this Court "seriously question[ed] whether plea negotiations are relevant evidence [under rules 401 and 402] in a criminal prosecution. The negotiation strategy and positioning of either the defense or the prosecution is not evidence of the elements of the crime charged." Pearson, 818 P.2d at 584 n.6.

Pursuant to Rules 401 and 402, the state's evidence at trial that Smedley requested plea negotiations in this matter should have been excluded as irrelevant, as further

explained below. See infra, subpart A.(3), herein.[2]

(3) *The Statements at Trial.*

In this case, the trial court improperly allowed the state to admit evidence of

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2 Under the case law, it is irrelevant that the defendant waived his right to counsel and to remain silent under Miranda when he requested plea discussions. The plea discussions are inadmissible under the rules of evidence.

> In the present case, the evidence shows that the detectives administered standard *Miranda* warnings, informing the defendant that he had a right to remain silent and that anything he said could be used against him in court. The state contends that the defendant's waiver of his *Miranda* rights also constituted a knowing waiver of the protections of Rules 410 and 11(e)(6). We disagree. *Miranda* warnings sufficiently apprise defendants of their Fifth Amendment right to remain silent. In addition, the United States Supreme Court has held that *Miranda* warnings sufficiently inform defendants of their Sixth Amendment right to counsel such that a subsequent waiver is knowing. *Patterson v. Illinois,* 487 U.S. 285, 293-94, 108 S.Ct. 2389, 2395, 101 L.Ed.2d 261 (1988). The Court determined that by "telling [Patterson] that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [this] conveyed to [Patterson] the sum and substance of the rights that the Sixth Amendment provided him" such that his subsequent waiver was knowing. *Id. Miranda* warnings specifically inform defendants that they have the right to remain silent and the right to have an attorney present. Thus, *Miranda* warnings serve to make defendants aware of those specific rights. However, *Miranda* warnings do not mention the rights provided by Rules 410 and 11(e)(6). Thus, the warnings cannot make a defendant fully aware of the nature of the rights provided by Rules 410 and 11(e)(6) such that a waiver of *Miranda* rights is also a knowing waiver of the rights provided by the rules. *See generally Roberts v. Commonwealth,* 896 S.W.2d 4, 7 (Ky.1995) (though not discussing waiver, the court held that statements made by a defendant during plea discussions were inadmissible pursuant to Kent. R. Evid. 410, and the defendant had been advised only of his *Miranda* rights prior to discussions); *Barnett v. State,* 725 So.2d 797, 801 (Miss.1998) (though not addressing waiver, the court held that Rule 410 prohibited the use of the defendant's statements made during plea discussions after the defendant had been given *Miranda* warnings).

State v. Hinton, 42 S.W.3d 113, 124 (Tenn. 2001).

Smedley's plea discussions. The statements were inadmissible under the two-tiered test adopted by federal courts for application of Rule 410, and/or they were inadmissible under Rules 408, 401, and 402.

To begin the analysis under the facts of this case, during trial, the prosecutor engaged in the following examination of Detective Rackley:

> [PROSECUTOR]: Okay. Then what did he say?
> [DETECTIVE RACKLEY]: He denied that [he engaged in any improper sexual contact with the girls] and then he wanted to know what – you know, what kind of deal he could get if he pled guilty, you know, exactly what the penalty would be. If he were to plead guilty, what would he get.
> [PROSECUTOR]: Okay. Did you ever tell him of any charges?
> [DETECTIVE RACKLEY]: No.
> [PROSECUTOR]: Were there any charges at that point?
> [DETECTIVE RACKLEY]: No.
> [PROSECUTOR]: Did you ever discuss with him penalties or punishment?
> [DETECTIVE RACKLEY]: No.
> [PROSECUTOR]: Did you ever bring up with him that you wanted to make a deal or could make a deal with him?
> [DETECTIVE RACKLEY]: No.
> [PROSECUTOR]: Did you ever talk to him about it was maybe in his best interest or not to work with you?
> [DETECTIVE RACKLEY]: No.
> [PROSECUTOR]: Okay. How may times did he tell you that he wanted to know what kind of deal he could get if he pled guilty?
> [DETECTIVE RACKLEY]: Several times. He kept asking what kind of a deal could he get, How long as I looking at?
> [PROSECUTOR]: And what would your response to him ?
> [DETECTIVE RACKLEY]: Well, Detective Roberts, I remember him answering too. He was like, we don't make deals with people, that's not our job, that's not our position. We want to talk about the case, we want to know, you know, what happened. We want to get his side of the story.
>
> Well, I need to know what kind of, you know, charges I'm looking at. I need to know what kind of time and penalty I'm looking at.
> [PROSECUTOR]: Did he ever say why he wanted to take a deal if he denied the allegations?

[DETECTIVE RACKLEY]: Why he wanted to take a deal?
[PROSECUTOR]: Uh-huh.
[DETECTIVE RACKLEY]: Not that I recall.
[PROSECUTOR]: Did he ever tell you anything about the girls having to testify or not?
[DETECTIVE RACKLEY]: He did mention that, he didn't want the girls to have to testify, but he just needed to know what kind of penalties this would come with before he would, you know talk to us any further.

(R. 277:170-72.)

Notwithstanding defense counsel's pretrial objections to the testimony about a plea deal, the trial court allowed the testimony on the basis that the evidence was relevant and reflected an admission of guilt.[3] The ruling is directly contrary to policy considerations

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3 During the first trial, the defense objected to the detective's testimony about a possible "deal"on the grounds that the testimony was irrelevant and did not constitute an admission that could be used against Smedley under Miranda. (R. 272:182-86.) Also, according to counsel, Smedley's inquiry into plea negotiations constituted a "typical question that detectives talk with clients a lot about, whether or not they'll go easier on them if they talk now and that sort of thing. It's not an admission of guilt." (R. 272:185-86; see also id. at 182-83.) That objection properly preserved the issue for appeal. It implicated the policy considerations underlying Rules 408 and 410, and the relevancy objection specifically implicated Rules 401 and 402, Utah Rules of Evidence. See supra, subpart A.(1) and (2), herein. The trial court overruled the objection and allowed the state to elicit testimony from Detective Rackley that Smedley requested a plea deal. (R. 272:186.)

At the second trial, defense counsel renewed his objection to that particular line of questioning during pretrial proceedings. (R. 277:78-79.) In response to the objection, the prosecutor stated that "[a]s before" the evidence was relevant and admissible. He claimed that it was an admission of guilt. (R. 277:79-80.) The trial judge asked the prosecutor if he intended to use the statements as an admission, and when the prosecutor said yes, the judge noted the objection for the record and proceeded as before, declining to reconsider his earlier ruling on the matter. (R. 277:80.) Thereafter, in light of the trial court's ruling during the first trial and its refusal to reconsider the matter in connection with the second trial, the state questioned the detective about the plea negotiations. (R. 277:171-72); see Saunders, 1999 UT 59, ¶¶18-19 (ruling that once a defendant makes a

prohibiting the admissibility of such evidence under Rules 408 and 410, and it was improper under Rules 401, 402 and 403.[4]

In considering exclusion of the evidence under Rule 410, this Court should adopt the two-tiered test used by federal courts, as set forth above. See supra, subpart A.(1), herein. That test contains a subjective component and an objective component. The Court first will consider whether the defendant exhibited an actual, subjective expectation to negotiate a plea at the time in question, and second, whether the defendant's

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motion before trial to exclude evidence, the issue is properly preserved and the defendant is not required to further object to the matter at trial).

During closing argument, defense counsel made reference to the inadmissible statements and urged the jury to find that they did not support guilt. (R. 278:251.) That was appropriate under the law, given the way in which the trial court ruled on the matter, and the fact that defense counsel had no other choice but to proceed with the case in light of that ruling. See S.L.C. v. Holtman, 806 P.2d 235, 237 and n.2 (Utah Ct. App. 1991) (identifying federal cases that support once the trial court has ruled on an objection/motion, it is properly preserved; where defense counsel then had no choice but to proceed in light of the ruling does not constitute waiver or invited error); State v. Burns, 2000 UT 56, ¶20, 4 P.3d 795 (recognizing that trial court ruling left defendant with no choice but to proceed in light of ruling; that does not constitute a waiver of the issue on appeal).

4 In the event the prosecutor in this case actually intended to present the evidence of plea discussions to support that Smedley intended to protect the girls from having to testify at trial, the statements in that instance would be presented for "the truth of the matter asserted." See Utah R. Evid. 801(c) (2002). Also, the statements plainly in that instance would not constitute an admission of guilt. Thus, the statements would be inadmissible under the hearsay rules. Utah R. Evid. 801, 802 (2002). In the event that is what the prosecutor intended to communicate with the statements in this case, the prosecutor presented the evidence in such a way so as to confuse the jury and to unfairly prejudice Smedley, by also suggesting that the statements supported an admission. In that regard, the statements also were inadmissible under Rule 403, Utah R. Evid. (2002).

expectation of such was reasonable given the circumstances. See Conaway, 11 F.3d at 42.

Under the first prong, Smedley exhibited an actual, subjective intent to negotiate a plea at the time in question. Detective Rackley testified here that after Smedley denied any wrong doing, he wanted to talk about a plea deal with the officers. (R. 277:170.) Rackley did not tell Smedley what the charges would be, she did not discuss penalties or punishment, and she did not state whether she wanted to make a deal or could make a deal with Smedley. (R. 277:171.) According to Rackley, Smedley told her "[s]everal times" that he wanted to discuss a plea deal. "He kept asking what kind of a deal could he get, How long am I looking at?" (R. 277:171.)

Thereafter, a second officer, Detective Roberts, advised Smedley that "[w]e don't make deals with people, that's not our job, that's not our position." (R. 277:171.) According to the record, once the officers made that statement to Smedley, he did not make any further comment about a plea "deal." (See R. 277:171-72.)

Rackley also disclosed that Smedley wanted to make a deal so that the girls would not have to testify at trial. (R. 277:171-72.) He did not want them to have to go through the trauma of a trial.

The evidence supports that Smedley reasonably believed he was able to discuss a plea with the officers. He requested a "deal" several times with the officers and he reasonably believed he could have such discussions with them until the officers informed

him otherwise. (R. 277:171.) Up until the time the officers informed Smedley that they do not make deals, his belief that they could negotiate was reasonable, not only for a lay person, but also under the law. See Shabata, 678 P.2d at 788 (recognizing that in the prosecution, police officers are part of the government's prosecution team); Barbee, 331 F.2d at 846.

Indeed, according to the detective, Smedley's discussions about a plea continued until he was informed that the officers would not "deal." (R. 277:171.) Thereafter, Smedley did not engage in further discussions about a plea deal with the detectives. That is, once Smedley was told otherwise, his actions reflect that he had no interest in talking any further with the detectives about the matter. The first prong of the two-tiered test is established. In this case, Smedley exhibited an actual, subjective intent to negotiate a plea at the time in question. That intent was reasonable since Smedley was not advised initially that the detectives would not entertain a "deal."

Under the second prong of the test, the Court will consider whether the defendant's expectation was reasonable given the total circumstances. In this matter, Smedley's expectation was reasonable up to the point when the detectives revealed they would not or could not entertain plea discussions with him. (R. 277:171-72.) At that point, Smedley discontinued the talks. (Id.) Thus, the statements were reasonably made by Smedley to initiate a deal. Such statements constitute a plea discussion under the law, Brooks, 536 F.2d at 1139 (statements made in an effort to initiate a plea deal fall within the definition

of plea discussions), and must be deemed inadmissible under the rules of evidence.

Even if this Court narrowly interpreted Rule 410(4) and required proof that the plea discussions be with an "attorney for the prosecuting authority" before such evidence may be excludable, this Court should find that the discussions here were with an actual agent of the attorney, satisfying that factor, as follows.

First, it is plain in this case, that Rackley was an agent of the prosecutor. Rackley communicated Smedley's interest in a plea to the prosecutor, as supported by the fact that the prosecutor was aware of the discussions prior to trial. (See R. 272:182-83 (record indicates parties were aware of officer's testimony about a plea "deal" before the officer provided such testimony).) In addition, the prosecutor then offered a "deal" to Smedley. (R. 275:7 (defense discloses prior to trial that prosecutor offered to settle the matter for a plea on two first degree offenses).) The record supports that Smedley's statements served to initiate plea discussions "with an attorney for the prosecuting authority," Utah R. Evid. 410(4), where a member of the prosecution team (the detective) communicated Smedley's interests to the State prosecutor, and the prosecutor then made an offer.

Second, as stated above, under Utah law, an officer is a member of the prosecuting team. Shabata, 678 P.2d at 788. Thus, Smedley's statements regarding a plea deal were made to a member of the prosecution team in this case. That is sufficient to implicate application of Rule 410(4) and the exclusionary rule set forth therein.

Finally, in the event this Court is not persuaded that the federal two-tiered test is

sufficient under Rule 410(4), and/or this Court requires additional evidence to support that Detective Rackley was an agent of the prosecuting attorney for application of that provision, it should nevertheless find that the statements here were inadmissible. This Court should find that the statements were excludable under Rule 408. That rule excludes "compromise negotiations" from evidence, and does not contain the same language as Rule 410(4) that negotiations be "with an attorney" to trigger application of the rule. Thus, Rule 408 should apply in this case to suppress plea discussions between the defendant and a governmental officer.

Since Rules 410 and 408 serve some of the same policy considerations, see supra, subpart A.(1), as a guide this Court may apply the federal two-tiered test set forth above (for application of Rule 410(4)) to determine whether statements must be excluded from evidence under Rule 408. That is, under Rule 408, this Court should assess, first, whether the defendant "exhibited an actual subjective expectation" to engage in compromise negotiations at the time in question, and second, whether the defendant's "expectation was reasonable given the totality of the objective circumstances." Conaway, 11 F.3d at 42; Pearson, 818 P.2d at 583 n. 4 (citing Verdoorn, 528 F.2d at 107, for the proposition that "under the rationale of Fed. R. Evid. 408, which relates to the general inadmissibility of compromises and offers to compromise," plea discussions in criminal cases should be excludable).

To that end, as set forth above (supra, pages 19-21, herein), under the federal two-

tiered analysis, the statements in this case were inadmissible. Thus, this Court should find that the statements should have been suppressed under Rule 408. The trial court erred in failing to exclude Detective Rackley's testimony from evidence regarding Smedley's plea discussions.

Also, the evidence in this case is inadmissible under Rules 401 and 402. Rules 401 and 402 provide that to be relevant, evidence must have a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401 (2002). Also, "[e]vidence which is not relevant is not admissible." Id. at 402.

In Pearson, 818 P.2d 581, this Court stated that "[s]ignificant issues of public policy" support the position that "evidence of plea discussions in which the defendant participated should not be admissible either against or in favor of the defendant." Id. at 583. Also, "[p]lea bargaining is an essential component of the criminal justice system, and as such, is sanctioned by the Utah Rules of Evidence." Id. at 582. Plea discussions are encouraged by the courts, and fairness dictates that such discussions should not be admitted into evidence. Id. at 583. This Court also stated that under Rule 401 or 402, "we seriously question whether plea negotiations are relevant evidence in a criminal prosecution. The negotiation strategy and positioning of either the defense or the prosecution is not evidence of the elements of the crime charged." Id. at 584 n.6.

In this case, the state expressed that it intended to introduce evidence of Smedley's

plea requests to establish an admission of guilt for the sexual offenses. Yet, legal authority supports that plea discussions do not constitute an admission of guilt (Fed. R. Evid. 408, Advisory Committee Note), and in fact in this case, Smedley was not requesting a plea deal for that reason. The record shows that Smedley sought such a deal in order to protect the girls from having to testify at trial. His request for a plea was for the benefit of the girls. (R. 277:171-72.)

Smedley's statements about a plea "deal" were irrelevant. Utah R. Evid. 401 & 402. Those statements did not make the state's allegations of improper sexual contact either more probable or less probable, particularly where Smedley's reasons for seeking a deal related to protecting the girls from the stress of trial. The statements did not establish any element of the crimes. The evidence did not support an admission on Smedley's part. See supra, subpart A.(1) (policy reasons for excluding evidence of "plea" discussions is that such evidence does not constitute an admission). And the evidence did not shed any light on Smedley's reasons for denying the allegations to the extent the state believed those denials to be untrue.

In short, the evidence in this case was not used for any relevant purpose. The statements about a plea "deal" were irrelevant under Rules 401, 402 and Pearson. Also, the state's purpose for admitting the plea requests into evidence stood at direct odds with the policy considerations underlying Rules 408 and 410(4). The trial court erred in admitting the statements into evidence. The error was harmful to Smedley, as set forth below.

B. THE STATEMENTS PREJUDICED SMEDLEY.

The Utah Supreme Court has specified that under a prejudice analysis, "[i]f, in the absence of the evidentiary errors, there is a reasonable likelihood of a more favorable outcome for defendant, we must reverse the conviction." State v. Rimmasch, 775 P.2d 388, 407-408 (Utah 1989); State v. Mitchell, 779 P.2d 1116, 1122 (Utah 1989) (in assessing prejudice, this Court will consider the case absent the evidence that was wrongfully admitted).

In assessing prejudice in this case, this Court will consider the strength of the state's evidence presented at trial. If the case hinges on a determination of credibility, this Court will be more likely to find that inadmissible evidence was prejudicial. Rimmasch, 775 P.2d at 407-08.

This case hinged on credibility. To find Smedley guilty of 4 counts of first degree sexual abuse of a child, the jury was required to believe the girls' vague claims that Smedley touched them in a "wrong place" over the course of a year, while their mother was close by in the one-bedroom apartment. Also, the jury was required to believe that when Smedley allegedly improperly touched the girls, other members of the family were present. Yet, none of the claims of improper touching were corroborated by witnesses.

Indeed, in this case, the state's only evidence of alleged abuse came in the form of testimony from S.B. and K.B. Both girls used the same terminology when describing the matter; both girls testified that they talked to several people about the alleged contact; and

both girls repeatedly testified that they *did not remember* details about the alleged abuse when they were asked specific questions by the defense. (See R. 277:115, 125-32, 137, 148-53, 157-58.) As demonstrated in the first trial of this case, the vague testimony left jurors with reasonable doubt. (R. 273:278-80.)

Also, although S.B. and K.B. both testified that their mother was in the apartment when the alleged abuse occurred (R. 277:123, 150), Baldwin did not observe any unusual behavior between Smedley and her daughters. (R. 277:94-96, 99-100.) In fact, according to Baldwin, Smedley and her daughters had a good relationship. (Id.) Also, in this case, Rackley testified that Smedley denied any abuse. Thus, the case came down to the girls' testimony against Smedley's denials.

In other contexts, Utah appellate courts have refused to find "harmless" error where the evidence on a critical issue is circumstantial, or where the jury was required to resolve conflicts in the evidence. Rimmasch, 775 P.2d at 407-08; State v. Byrd, 937 P.2d 532, 536 (Utah Ct. App. 1997); State v. Troy, 688 P.2d 483, 486-87 (Utah 1984); State v. Andreason, 718 P.2d 400, 403 (Utah 1986) (when the evidence in the record is circumstantial or sufficiently conflicting, court is less likely to find harmless error).

In this case, the evidence required the jury to resolve conflicts and draw conclusions where there were vague allegations. The jurors may have been searching for some reason beyond the girls' testimony to believe that abuse occurred. The state's evidence that Smedley was willing to negotiate a plea may have provided jurors with that

reason, or it may have allowed the jurors to justify the convictions in this case where they were aware that he was willing at one time to pay a price even while he maintained his innocence.

In seeking to make some sense of the irrelevant information concerning Smedley's willingness to bargain with the state, and the girls' unsubstantiated and vague reports of abuse, the jurors likely were unduly influenced by the evidence of the plea discussions. In that regard the inadmissible evidence influenced the jurors' verdict in this matter and violated Smedley's right to a fair trial. A reasonable likelihood exists that if the state had been prohibited from admitting testimony of the plea discussions into evidence, Smedley would have been acquitted of the charges in this case. On that basis, this Court must reverse the convictions and remand the case for a new trial, where the state would be precluded from admitting the statements into evidence.

CONCLUSION

For the reasons set forth herein, Smedley respectfully requests that this Court reverse and remand this case to the trial court for a new trial.

SUBMITTED this 19th day of August, 2002.

LINDA M. JONES
DAVID FINLAYSON
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 19th day of August, 2002.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this __ day of _____, 2002.

_____

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 011900112 FS
KORRY BARLOW SMEDLEY, Defendant.	:	Judge: PAUL G. MAUGHAN Date: February 4, 2002

PRESENT
Clerk: cheril
Reporter: TRIPP, DOROTHY
Prosecutor: BOWN, GREGORY L.
Defendant
Defendant's Attorney(s): FINLAYSON, DAVID V
Agency: Adult Probation & Parole

DEFENDANT INFORMATION
Date of birth: March 26, 1958
Video
Tape Number: Video Tape Count: 10:29

CHARGES

1. AGGRAVATED SEX ABUSE OF A CHILD - 1st Degree Felony
   Plea: Not Guilty - Disposition: 11/28/2002 Guilty
2. AGGRAVATED SEX ABUSE OF A CHILD - 1st Degree Felony
   Plea: Not Guilty - Disposition: 11/28/2002 Guilty
3. AGGRAVATED SEX ABUSE OF A CHILD - 1st Degree Felony
   Plea: Not Guilty - Disposition: 11/28/2002 Guilty
4. AGGRAVATED SEX ABUSE OF A CHILD - 1st Degree Felony
   Plea: Not Guilty - Disposition: 11/28/2002 Guilty

Case No: 011900112
Date: Feb 04, 2002

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED SEX ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED SEX ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED SEX ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED SEX ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

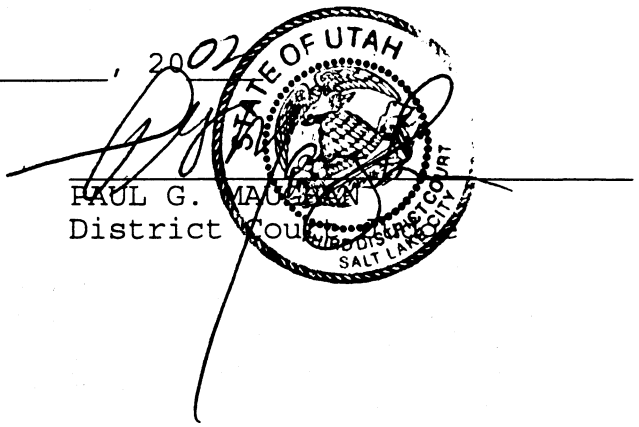
To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Counts 1 & 2 to run concurrent to each other and consecutive to counts 3 & 4. Counts 3 & 4 to run concurrent with each other.

Case No: 011900112
Date: Feb 04, 2002

Dated this 7 day of Feb, 2002



PAUL G. MAUGHAN
District Court Judge

ADDENDUM B

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in